TETANGGA AKRAB SDN BHD

v.

TUAN JAWIE & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[SUIT NO: 22-132-2000-III (II)]
19 AUGUST 2005

CIVIL PROCEDURE: *Parties - Third party notice - Summons for leave to issue third party notice - Rules of the High Court 1980, O. 16 r. 1(2) - Whether complied with - Res judicata - Whether arose - Whether there was a prima facie case made out in respect of O. 16 r. 1(c) of the Rules of the High Court 1980 - Provision of O. 73 r. 8(2) of the Rules of the High Court 1980 - Whether satisfied*

The applicants/defendants herein sought for summons for leave to issue a third party notice. The issues that arose were (1) whether the applicants/defendants were 'estopped' from instituting this third party action due to non-compliance of O. 16 r. 1(2) of the Rules of the High Court 1980 ('RHC'); (2) whether the issue of *res judicata* arose since the applicants/defendants had previously filed a notice of discontinuance and withdrawal of their application for summons for leave to issue a third party notice against the first and second third party *ie*, the Superintendent of Lands and Surveys Samarahan Division and the State Government of Sarawak ,the intended first and second third party in the application before this court; (3) whether the applicants/defendants had made out a *prima facie* case within any of the limbs in O. 16 r. 1 of the RHC and (4) whether the provision of O. 73 r. 8(2) of the RHC was satisfied.

Held (granting order in terms of application):

[1] Since the applicants/defendants have entered appearance and proceedings have commenced thus far, the defendants have acted correctly in seeking summons for leave to issue third party notice. In this case, they were seeking to serve the third party notice on the government in compliance with O. 73 r. 8 of the RHC. Therefore, the objection of the plaintiff's counsel with respect to the defendants' non-compliance with O. 16 r. 1(2) of the RHC did not hold water. (p 534 d-f)

[2] The issue of *res judicata* did not arise because the court had not made any final ruling or any ruling whatsoever due to the circumstances leading to the withdrawal of the summons for leave to issue third party notice and the notice of discontinuance. (p 535 b-c)

[3] Since all three limbs under O. 16 r. 1 of the RHC is to be read disjunctively, the court found that based on the affidavit in support of one Nyopen ak Ahtek, there was a *prima facie* case made out in respect of O. 16 r. 1(c) of the RHC. (p 535 e)

[4] The provision of O. 73 r. 8(2) of the RHC was satisfied because when the court queried whether the counsel for the intended 1st and 2nd third party was ready to proceed with the hearing, the counsel had answered in the affirmative. (p 536 a)

Case(s) referred to:
Chong Yew Kee v. Wah-Chang International [1995] 1 SLR 153 ***(refd)***
Mat Abu Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC ***(refd)***
Valliammai Achi v. Nachiappa [1957] MLJ 27 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 16 r. 1(a), (b), (c), (2), O. 73 r. 8(2)

Other source(s) referred to:
Malaysian High Court Practice 2001, Desk edn, vol 1, paras 16.1.2, 16.1.8, 16.2.2, pp 452, 454, 455

For the plaintiff - William Chang (Ratanah Devi with him); M/s Yong & Co
For the defendants - Dominique Ng; M/s Dominique & Assoc
For the intended 1st & 2nd third party - Sabwati Balia

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:
The court has considered the oral submissions of Mr. William Chang, counsel for the plaintiff, Ms. Sabwati Balia, State Legal Officer on behalf of the Intended 1st and 2nd third party and the written-cum oral submissions of the applicants' (defendants) counsel, Mr. Dominique Ng.

The court's findings are as follows:

(1) Third party proceeding under O. 16 of the Rules of the High Court 1980 ("the RHC") must be looked at as independent proceedings between the defendant as plaintiff and the third parties as defendants: *Valliammai Achi v. Nachiappa* [1957] MLJ 27 CA, *Mat Abu bin Man v. Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC, *Chong Yew Kee v. Wah-Chang International* [1995] 1 SLR 153 referred to in para. 16.1.2 at p. 452 of Malaysian High Court Practice 2001. Desk Edition Vol. 1.

(2) Mr. Chang raised the point that the applicants/defendants are "estopped" from instituting this third party action because of O. 16 r. 1(2) of the RHC. With respect, I find that this contention is misleading.

Order 16 r. 1(2) reads:

> (1) Where in any action a defendant who has entered appearance:
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> (a) claims against a person not already a party to the action any contribution or indemnity; or
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> (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
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> (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action;
>
> then, subject to paragraph (2), the defendant may issue a notice in Form 22 or 23, whichever is appropriate (in this Order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

The procedure is spelled out in para. 16.1.8 at p. 454 of *Malaysian High Court Practice (supra)* as follows:

> The defendant must have first entered an appearance before issuing a third party notice. He may issue a third party notice without the leave of the court if the action is one begun by writ and he does so before serving his defence on the plaintiff. Leave of the court is necessary for issue of the third party notice if the action is one begun by an originating summons or if the defendant has served his defence on the plaintiff. On leave to issue a third party notice, see r. 2. Leave of the court is also necessary when it is sought to serve the third party notice on the government: O. 73 r. 8.

Again, it is stated at para. 16.2.2 at p. 455 of *Malaysian High Court Practice (ibid)* as follows:

> In order to issue a third party notice, a defendant must first have entered an appearance, and may issue the notice without leave if the notice is issued before delivery of defence. Leave is necessary after delivery of defence, and when the action is begun by originating summons: *Birmingham & District Land Co v. L & NW Ry* [1886] 55 LT 699.

Since, on the facts of this instant case, where defendants have entered appearance and proceedings have commenced thus far, the defendants have acted correctly in seeking summons for leave to issue third party notice more so, as in this case, they are seeking to serve the third party notice on the government and to be in compliance with O. 73 r. 8 of the RHC which states:

> (1) Notwithstanding anything in Order 16, a third party notice (including a notice issuable by virtue of Order 16 rule 9) for service on the Government shall not be issued without the leave of the Court, and the application for the grant of such leave must be made by summons, and the summons must be served on the plaintiff and the Government.

Therefore, I reiterate, Mr. Chang's objection with respect to the defendants' non-compliance with O. 16 r. 1(2) of the RHC does not hold water.

(3) Mr. Chang and Cik Sabwati Balia have raised the issue of *res judicata* and they submitted previously the defendants had filed a notice of discontinuance and withdrawal of their application for summons for leave to issue a 3rd party notice against the first and 2nd third party, ie, the Superintendent of Lands & Surveys Samarahan Division and the State Government of Sarawak who are the intended 1st and 2nd third party in the application before the court now.

I have examined the notice of discontinuance dated 19 July 2001 (encl. 286) and the letter from Messrs Dominique Ng & Associates titled "Summons For Leave To Issue Third Party Notice – Offer To Withdraw" dated 14 July 2001 (encl. 272). I note the circumstances under which the withdrawal was made and I highlight the penultimate paragraph of the said letter, "So if the Honourable Court is of the opinion that there is no such necessity presently, or at all of the proposed 3rd parties, then the defendants are more than willing to withdraw the said application ..." Mr. Ng submitted that the issue of *res judicata* does not arise because the court has not made any final ruling. In my view, not only has the court not made any final ruling it has for that matter not made any ruling whatsoever due to the circumstances leading to the withdrawal of the summons for leave to issue 3rd party notice and the notice of discontinuance.

Furthermore, in the notice of discontinuance, there is no clause to the effect that there is no liberty to file afresh.

(4) The determination of the application therefore turns on a consideration of whether the applicant has made out a *prima facie* case within any of the limbs in r. 1 of O. 16 of the RHC before the court exercise its discretion to grant leave.

In evaluating the arguments of Cik Sabwati, I am in agreement that no *prima facie* case has been made under O. 16 r. 1(a) and (b). However, since all the 3 limbs under O. 16 r. 1 is to be read disjunctively, I find that based on the affidavit in support of Nyopen ak Ahtek affirmed on 29 July 2005, there is a *prima facie* case made out in respect of O. 16 r. 1(c) of the RHC. This is borne out in paras. 5, 6 and 7 of the said affidavit in support.

(5) One point for consideration is O. 73 r. 8(2) of the RHC which has not been addressed by any of the parties during the hearing of the application. Order 73 r. 8(2) of the RHC reads as follows:

> (2) Leave to issue such a notice for service on the Government shall not be granted unless the Court is satisfied that the Government is in possession of all such information as it reasonably requires as to the circumstances in which it is alleged that the liability of the Government has arisen and as to the departments and officers of the Government concerned.

I am of the view that this provision has been satisfied because when I queried whether the counsel for the intended 1st and 2nd third party was ready to proceed with the hearing, Cik Sabwati Balia answered in the affirmative, although initially an adjournment was sought till September 2005 which is now overtaken by the events that followed thereafter.

(6) For the reasons adumbrated above, I grant order in terms of applicants' application.